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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-999

WILLIAM PAUL KOHNE AND PAUL PATRICK WOODS, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-5819

PATRICK DENHAM & JEANINE DENHAM, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 73-6015

JOSEPH TABELLA, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. No. 73-999, App. 95-96; Pet. No. 73-5819, App. A) are not reported. The opinions of the district court are reported at 347 F. Supp. 1178 (Pet. No. 73-5819, App. B); 358 F. Supp. 1046 (Pet. No. 73-999, App. 39; Pet. No. 73-5819, App. C); and 358 F. Supp. 1053 (Pet. No. 73-999, App. 65; Pet. No. 73-5819, App. D). The district court memorandum and order of May 15, 1973 (Pet. No. 73-999, App. 89; Pet. No. 73-5819, App. G) is not reported.

JURISDICTION

The judgment of the court of appeals in No. 73-5819 and No. 73-6015 was entered on October 5, 1973. A petition for rehearing filed by petitioners in No. 73-5819 was denied on November 21, 1973. The petition for a writ of certiorari in No. 73-5819 was filed on November 28, 1973. The petition in No. 73-6015 was filed on January 2, 1974, and is out of time under Rule 22(2) of this Court. The judgment of the court of appeals in No. 73-999 was entered on November 26, 1973, and the petition for a writ of certiorari was filed on December 26, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2520, was unconstitutionally applied in this case

(raised in Nos. 73-5819 and 73-6015), or is unconstitutional on its face (raised in No. 73-999).

2. Whether the trial court properly determined that petitioners were not denied a fair trial by the alleged coercion of a juror by his fellow jurors (raised in Nos. 73-999, 73-5819 and 73-6015).

3. Whether petitioners were denied effective assistance of counsel because their retained counsel also represented a co-defendant (raised in No. 73-5819).

4. Whether evidence seized from petitioner's residence should have been suppressed as the fruits of an illegal search (raised in No. 73-6015).

5. Whether evidence obtained through electronic interception should have been suppressed on the grounds that the interception applications were not properly authorized under 18 U.S.C. 2516(1) (raised in Nos. 73-999, 73-5819 and 73-6015).

STATEMENT

On December 8, 1971, a two count indictment was returned in the United States District Court for the Western District of Pennsylvania, charging petitioners and five others with conducting an illegal gambling business in violation of 18 U.S.C. 1955 (Count II) and conspiring to commit that offense (Count I). Following a jury trial, petitioners were convicted on the second count and were acquitted on the conspiracy count (Pet. App. 66).[1]

[1] "Pet. App." refers to the Appendix in No. 73-999. Two of the defendants pleaded guilty to the second count of the indictment (Pet. App. 66). All other defendants moved

Petitioner Kohne was fined $10,000 and sentenced to three years' imprisonment, of which he was required to serve six months and the balance was suspended; he was placed on probation for five years. Petitioner Woods was fined $5,000 and sentenced to three years' imprisonment, of which he was required to serve ninety days, and the balance was suspended; he was placed on probation for five years. Petitioner Patrick Denham was fined $1500 and placed on probation for five years; petitioner Jeanine Denham was sentenced to five years' probation. Petitioner Joseph Tabella was fined $1500 and placed on probation for five years.

The district court filed several opinions, including one denying motions to suppress the wire interception evidence and to dismiss the indictment, 347 F. Supp. 1178 (Pet. App. 11-30), and another opinion denying motions for a mistrial and a new trial based on alleged coercion of a juror, 358 F. Supp. 1046 (Pet. App. 39-52). The court of appeals affirmed without opinion (Pet. App. 95-96; Pet. No. 73-5819, App. A).

The government's proof at trial was primarily based on evidence obtained from three court-authorized wire interceptions conducted pursuant to the federal wire interception statute, 18 U.S.C. 2510-2520. Prior to trial, petitioners and the other defendants moved to suppress the tape recordings resulting

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for acquittal after trial; the court granted the motion of two of the defendants, and denied those of the others, including all these petitioners (Pet. App. 63, 86-87).

from these interceptions, alleging that the applications for the interception orders were not authorized as required by 18 U.S.C. 2516(1) (Pet. App. 11).[2] In response, the government filed affidavits of Sol Lindenbaum, Henry E. Petersen, and John Mitchell, which showed that the former Attorney General personally approved the requests to apply for interception orders in this case, and personally intialed memoranda to Will Wilson, then the Assistant Attorney General of the Criminal Division of the Justice Department, informing him of the approval and designating him to authorize the attorney in the field to submit the application to the district judge. The letters of authorization were sent to the field attorneys over Mr. Wilson's signature. Pursuant to Mr. Wilson's directions, and in accord with the usual Justice Department procedures, Mr. Wilson's signature was affixed to the letters by a deputy, in this case by then Deputy Assistant Attorney General Henry Petersen (Pet. App. 21). Mr. Wilson's name appeared in the application and order as the official authorizing the application.

After reviewing the affidavits, the district court denied the motion to suppress the recordings (Pet. App. 30).

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[2] That statute provides that "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction" for an interception order; 18 U.S.C. 2518 directs that the application and order identify the official authorizing the application.

The tapes were introduced at trial, and contained numerous conversations between petitioners and their co-defendants which indicated that they were involved in a gambling business. In addition, a search of petitioners Patrick and Jeanine Denham's household revealed gambling paraphernalia in their possession (Tr. 2171-2176). They admitted to the officer conducting the search that they were numbers writers until May of 1971 (Tr. 2175-2176).

The facts relevant to the search of petitioner Tabella's residence are set out in the April 25, 1973, opinion of the district court (Pet. App. 65, 78-79). They show that on July 12, 1971, federal agents went to 3710 Saw Mill Run Blvd. with a search warrant for Tabella's residence at that address. Tabella was not present there and subsequent investigation revealed that Tabella was then residing at 192 Provost Street. Upon arrival at Tabella's new residence, the agents informed Tabella that they had a search warrant for his former residence, but stressed that the agents had no authority to search the new residence unless Tabella consented. Tabella reviewed a consent form and orally gave his consent to the search, but refused to sign anything.

Petitioner Kohne was the only one of the defendants to testify. Insofar as his testimony is relevant to the issues raised in the petition in No. 73-5819, filed by the Denhams, Kohne testified that he knew the Denhams, and that they turned in numbers to him at times, but that they could and sometimes did turn in their numbers elsewhere (Transcript of Feb-

ruary 12, 1973, pp. 23-24). He testified that the Denhams received a commission on the numbers they turned in to him, and they were not his employees and had no interest in or control of the business (Transcript of February 12, 1973, pp. 24-25).

Kohne further testified that he was the sole owner of his numbers business, no one else had anything to do with the direction or management of it, and that he had only one employee (Transcript of February 12, 1973, pp. 10-11). He claimed that the business was never conducted for 31 consecutive days uninterrupted, and that the amount of his numbers operation never exceeded $2,000 on any given day (Transcript of February 12, 1973, pp. 26-27).

Approximately four days after the jury returned its verdict, juror Steven Tisak met with three defense counsel at the law offices of the Denhams' trial counsel. There he signed a statement in which he complained that other jurors intimidated him and caused him to join in the verdict of guilty. Petitioners filed a motion for a mistrial. The court held a hearing at which counsel for the government and the defendants were given the opportunity to suggest additional questions to be asked of Tisak, but were not allowed to cross-examine him (Pet. App. 40, 42).

Tisak testified that after their night of sequestration, certain jury members "tensed their muscles at me and they told me that I am opinionated" (H. Tr.

17-18),[3] and "[o]ne man flatly stated if he has to sleep in those cots again, he will guarantee me he would be in a federal court in the morning for murder" (H. Tr. 18). Another juror "flexed his muscles" and "hollered" at Tisak (Tr. 19-20). Another man "kept slamming his fist into his hand and he kept saying 'I don't get mad. I just get even' " (H. Tr. 21). Tisak stated that no one actually struck him or physically harmed him in any way (Tr. 18; 21), and that he never complained to the court or to the bailiff (H. Tr. 30-32).

When the jury was polled following the return of the verdict, Tisak agreed that the verdict returned was his verdict, and he did not refer to the alleged coercion (H. Tr. 22). Mr. William Ellis, the court crier, testified that at breakfast following their night of sequestration, the jurors were "jovial" and in "fairly good humor," and Tisak was "talking and laughing" with other jurors (H. Tr. 42).

The district court denied petitioners' motion. It concluded that "the statements and actions of some of the jurors amounted only to heated expressions of annoyance with Tisak during the second day of deliberations; that the threats were empty ones, expressive of impatience, exasperation and frustration, and did not actually cause Tisak to fear bodily harm, or forcibly compel him to change his vote" (Pet. App. 46).

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[3] "H. Tr." refers to the transcript of this hearing, a copy of which we are lodging with the Clerk of this Court.

ARGUMENT

1. Petitioners in Nos. 73-5819 and 73-6015 argue that the wire interception statute (18 U.S.C. 2510-2520) was unconstitutionally applied in this case because Pennsylvania state law forbids wire interceptions (18 P.S. 3742), and the federal crime charged encompasses state law since a gambling business is illegal under 18 U.S.C. 1955(b)(1)(i) only if it is illegal in the state in which it takes place. Federal law, however, governs the admissibility of evidence in federal criminal trials, and under that law evidence is admissible even if it was obtained in violation of state law. *Olmstead* v. *United States*, 277 U.S. 438, 469; *United States* v. *Escobedo*, 430 F.2d 603, 607 (C.A. 7), certiorari denied, 402 U.S. 951; *United States* v. *Krol*, 374 F.2d 776, 778 (C.A. 7).[4]

2. Petitioners in No. 73-999 contend that the wire interception statute unconstitutionally permits unreasonable searches and seizures. Similar challenges have been uniformly rejected by every court of appeals which has passed on them. See, *e.g.*, *United States* v. *Tortorello*, 480 F.2d 764 (C.A. 2), petition for a writ of certiorari pending, No. 72-1703; *United States* v. *Bobo*, 477 F.2d 974 (C.A. 4), petition for a writ of certiorari pending *sub nom. Gray* v. *United States*, No. 73-231; *United States* v. *Whitaker*, 474 F.2d 1246 (C.A. 3), certiorari denied 412 U.S. 953;

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[4] In all of these cases, defendants unsuccessfully objected to the admission in federal criminal trials of recordings of conversations, on the ground that they were obtained in violation of state laws prohibiting such interceptions.

United States v. *Cox*, 462 F.2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72-5278; *United States* v. *Cox*, 449 F.2d 679 (C.A. 10), certiorari denied, 406 U.S. 934. The additional contention that the use of their intercepted conversations against them violated their privilege against self incrimination under the Fifth Amendment is answered by *Hoffa* v. *United States*, 385 U.S. 293.[5]

2. Petitioners' argument that they should have been granted a fuller evidentiary hearing or new trial based upon the contention that juror Tisak was coerced into voting for conviction was answered in the opinion of the district court, upon which we rely (Pet. App. 39).[6] The decision whether to grant a new trial or to order a full evidentiary hearing rests within the sound discretion of the trial court. Since

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[5] In their questions presented, petitioners in No. 73-999 challenge the constitutionality of 18 U.S.C. 1955, under which they were convicted. They do not argue the issue, however. The courts which have considered this issue have uniformly held that the statute is constitutional. See *e.g.*, *United States* v. *Ceraso*, 467 F. 2d 653 (C.A. 3); *United States* v. *Wolk*, 466 F. 2d 1143 (C.A. 8); *United States* v. *Palmer*, 465 F. 2d 697 (C.A. 6), certiorari denied, 409 U.S. 874; *United States* v. *Harris*, 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877.

[6] Petitioners' reliance on *Mattox* v. *United States*, 146 U.S. 140, is improper. A new trial was granted in that case when it was shown by affidavits of jurors that the bailiff told the jury that the defendant had killed two other persons and the jury had read a highly prejudicial newspaper article which commented on the evidence and on the case in general. The court here followed *Mattox* and considered juror Tisak's testimony insofar as it related to the existence of outside influence (Pet. App. 48).

the record here justifies the court's ruling, there is no ground for reversal. *Tillman* v. *United States*, 406 F.2d 930, 938 (C.A. 5), vacated in part on other grounds, 395 U.S. 830; *United States* v. *Carlson*, 423 F.2d 431, 439 (C.A. 9), certiorari denied, 400 U.S. 847.

3. The Denhams, petitioners in No. 73-5819, retained to represent them at trial the same counsel who represented Kohne, petitioner in No. 73-999 (Pet. App. 91). The Denhams now argue that they were denied effective assistance of counsel because of a conflict in interest between themselves and Kohne.[7]

Kohne's testimony indicates that his defense was that his gambling enterprise did not violate a federal statute (18 U.S.C. 1955), because the requisite elements of the federal offense were missing.[8] The Denhams did not present any independent defense, and they do not now allege that any was available to them which was inconsistent with petitioner Kohne's interests. The court saw no conflict between the interests of Kohne and the Denhams throughout the

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[7] The failure of the trial court to obtain a signed waiver from petitioners agreeing to joint representation does not merit a reversal of the case. Petitioners undoubtedly knew they had a right to counsel, since they retained Mr. Ashton.

[8] Those elements are that there must be "five or more persons who conduct, finance, manage, supervise, direct, or own" the business, and that it remained "in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day." 18 U.S.C. 1955. A review of Kohne's testimony shows that he carefully denied the existence of each of these elements (Transcript of February 12, 1973, pp. 10-13, 26-27).

pretrial hearings and conferences (Pet. App. 92). Since their defenses were not inconsistent, they were not prejudiced by Kohne's testimony, nor were they denied effective assistance of counsel. *Campbell* v. *United States*, 352 F.2d 359 (C.A.D.C.); *United States* v. *Rispo*, 460 F.2d 965, 971 (C.A. 3).[9]

4. Petitioner Tabella in No. 73-6015 contends that the evidence seized from his residence should have been suppressed because he merely "acquiesced to authority" and did not consent to the search.

The district court pointed out that his objection was raised for the first time at trial (No. 73-5819, Pet. App. D-9); the objection was therefore untimely under Rule 12(b)(3), Fed. R. Crim. P. In any event, the contention is without merit. The validity of a consent search in a case such as this is governed by *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 227, where this Court held that "the question whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances."[10] As shown in the statement,

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[9] There is no conflict between circuits on the question whether each defendant must have his own attorney (No. 73-5819, Pet. 11). *Ford* v. *United States*, 379 F. 2d 123 (C.A. D.C.), cited by petitioner, considers the court's responsibilities in appointing counsel for codefendants. It does not indicate that each defendant must be represented by separate counsel, even absent a showing of prejudice.

[10] Tabella was informed of his right to refuse consent to the search (Pet. App. 79), an element not required by *Schneckloth*, but identified as a factor to be taken into account, in determining the voluntariness of the consent, 412 U.S. at 249.

petitioner Tabella was not coerced into consenting to the search. As the district court noted (Pet. App. 78-79), the facts of this case distinguish it from *Bumper* v. *North Carolina*, 391 U.S. 543, upon which petitioner relies.

5. Petitioners contend that evidence seized through use of the court-ordered interceptions should have been suppressed because the interception applications were not properly authorized as required by 18 U.S.C. 2516(1), even though they were personally approved by the Attorney General. The facts concerning the authorization of the applications by the Attorney General are set forth in the first opinion of the district court (Pet. App. 19-21). The validity of the Department of Justice's internal procedures in authorizing electronic interception, and the propriety of suppressing evidence so obtained in a case such as this, are questions now before the Court in *United States* v. *Chavez*, No. 72-1319, certiorari granted, 412 U.S. 905, in which argument was heard on January 8, 1974.

CONCLUSION

The petitions for writs of certiorari should be denied. Since the issue of the validity of the wire interception application procedure followed in the instant case is before this Court in *Chavez*, however, the Court should defer disposition of these petitions until after it has decided *Chavez*.

Respectfully submitted.

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